No. 83-2159

In the Supreme Court of the United States

OCTOBER TERM, 1984

SONOMA VINEYARDS, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board acted within its discretion in overruling, without an evidentiary hearing, one of petitioner's election objections.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Statute:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 727 F.2d 860. The decision and order of the National Labor Relations Board (Pet. App. A14-A30) are reported at 264 N.L.R.B. 642. The Board's decision (Pet. App. A31-A37) and the Regional Director's report (Pet. App. A38-A56) in the underlying representation proceeding are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1984. A petition for rehearing was denied on May 3, 1984 (Pet. App. A57). The petition for a writ of certiorari was filed on June 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to stipulations between petitioner and Winery, Distillery & Allied Workers Union Local 186, AFL-CIO (the Union), a representation election was held on December 8, 1978, in a unit of production and maintenance employees at petitioner's facilities in Windsor, California. The tally of ballots showed 57 ballots for the Union and 40 against.[1] Pet. App. A38-A39.

Petitioner filed 19 separate objections to the election (Pet. App. A39-A42). In the only objection at issue here, petitioner alleged that the "Union, by its agents and supporters," created an "atmosphere of fear" by threatening alien employees with deportation (*id.* at. A45).[2] In support of this objection, petitioner submitted a declaration by one of its supervisors that "a few" unnamed "Spanish-speaking employees of Mexican descent" informed him that another unnamed employee told them that a third unnamed employee, allegedly a union supporter, had suggested at a union meeting that the Border Patrol be called (*id.* at A58). The statement further alleged that the employees of Mexican descent were "very upset by these rumors," but that the supervisor did not know whether any employees had been deterred from voting (*ibid.*).

The Regional Director recommended that petitioner's objections be overruled in their entirety without an evidentiary hearing (Pet. App. A51). With respect to the objection at issue here, the Regional Director noted that petitioner

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[1]In addition, there were 54 challenged ballots; the challenges were resolved following a hearing. Pet. App. A16-A18. The Board's disposition of the challenged ballots is not at issue in this petition.

[2]The employer listed three separate objections pertaining to the deportation threats, which were all based on the same incident. The Regional Director essentially treated them as a single objection. Pet. App. A45-A46.

had submitted no evidence that the rumors were attributable to the Union and no evidence establishing the number of employees allegedly exposed to the rumor or substantiating the "conclusionary assertion" that certain employees were "upset" by the rumor. The Regional Director noted further that there was no evidence that the Border Patrol actually was called. *Id.* at A45. She concluded that "[i]n light of these circumstances and especially in light of the fact that there is no evidence attributing this conduct to [the Union], it cannot be concluded that the conduct, if it occurred, had a substantial effect on the election * * *" (*id.* at A45-A46).

Petitioner filed exceptions to the Regional Director's recommendation, essentially reiterating its objections to the election (R. Doc. No. 27).[3] The Board adopted the Regional Director's recommendation that the objections be overruled without a hearing (Pet. App. A35-A37), and on July 14, 1981, following resolution of certain challenged ballots (see note 1, *supra*), certified the Union as the bargaining representative of petitioner's employees (*id.* at A31-A34).

2. After petitioner refused to recognize and bargain with the Union, the Union filed an unfair labor practice charge. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding. The Board granted summary judgment, finding that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to recognize and bargain with the Union. Pet. App. A14-A30.

3. The court of appeals enforced the Board's order in full (Pet. App. A1-A13). The court noted the "unreliability of

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[3]"R. Doc. No." refers to the "Agency Record" filed in the court of appeals.

the supervisor's hearsay declaration" and rejected petitioner's contention that the deportation rumor had been shown to be attributable to the Union. The court stated (*id.* at A9 (citations omitted)):

> At most, [petitioner] alleges an isolated statement by an unidentified person at an open Union meeting. The Union could not control every statement made at an open meeting. We find unpersuasive [petitioner's] contention that a party may become a union agent merely by speaking at such a meeting.

The court noted that deportation rumors not attributable to the Union generally do not create "an atmosphere of coercion sufficient to invalidate an election," and it pointed out that petitioner had failed to present evidence that any employee was actually coerced (*id.* at A9-A10). The court concluded that the Board therefore acted within its discretion in overruling the objection without an evidentiary hearing (*id.* at A10, A13).[4]

ARGUMENT

Out of 19 election objections originally filed, petitioner now challenges only the Board's disposition of the objection concerning the alleged deportation rumor. Petitioner contends that the Board's decision reflects the application of incorrect legal principles and that the court of appeals' decision upholding the Board conflicts with decisions of other circuits. There is no merit to these contentions. The cases relied on by petitioner do not establish a conflict in legal principles but rather merely demonstrate that different

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[4]The court also rejected petitioner's contentions that the alleged bias of the Board agent tainted the election, that one eligible employee was improperly discouraged from voting, and that certain other employees should have been included in the bargaining unit (Pet. App. A5-A8, A10-A13). No issue is presented here as to the court's ruling on these contentions.

factual circumstances and offers of proof in support of election objections will lead to different results under applicable legal standards. Further review of this claim is not warranted. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951).

1. Petitioner contends (Pet. 17-20) that the triple hearsay declaration of its supervisor, which referred only to rumors allegedly transmitted through various anonymous employees, was sufficient to establish a prima facie case for setting aside the election and that therefore the objection should not have been overruled without a hearing. That contention is without merit. It is well-settled that, to obtain a hearing or a new election, an objecting party is required to support its objection with "specific evidence of specific events from or about specific people," for "it is not up to the Board staff to seek out evidence that would warrant setting aside the election." *NLRB* v. *Singleton Packing Corp.,* 418 F.2d 275, 280 (5th Cir. 1969), cert. denied, 400 U.S. 824 (1970).[5] Petitioner failed to meet this burden. It did not identify either the person who allegedly suggested calling immigration authorities, the employee who allegedly informed others of this suggestion, or the employees who were allegedly so informed. Nor did it explain why it did not submit statements from the Mexican employees or the

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[5]Of course, hearsay evidence may establish a prima facie case of conduct sufficient to warrant setting aside the election where "an objecting party has specifically identified witnesses to corroborate hearsay evidence that supports its objections * * *." *Holladay Corp.,* 266 N.L.R.B. 621, 622 (1983). In such circumstances, the Regional Director is obligated to conduct an investigation and interview the named witnesses in determining whether a hearing should be held or the election set aside (*id.* at 621-622).

employee who allegedly spoke to them, instead of relying solely on compound hearsay.[6]

The cases relied on by petitioner (Pet. 18-19) are inapposite. In each of the cases cited, the employer presented affidavit evidence in which multiple affiants identified specific individuals, related the specifics of incidents or conversations in which either the affiants or the named individuals allegedly were involved, and made clear that they had obtained their information from the individuals directly involved in the incidents.[7] Here, by contrast, petitioner

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[6]Petitioner apparently argued in the court of appeals that the alien employees would not allow use of their names for fear of deportation. As the court noted (Pet. App. A8 n.3), however, they would presumably have had the same fear of testifying if a hearing were held. Moreover, their alleged fear does not explain petitioner's failure to identify the person who allegedly suggested calling immigration authorities or the person who transmitted the rumor.

[7]In *NLRB* v. *Nixon Gear, Inc.*, 649 F.2d 906, 913 (2d Cir. 1981), a case involving improper inducements by a union, multiple affiants stated that a named individual, Larry Darling, told them that the union had promised him a better job at another company if he supported the union, and that Darling had obtained for them applications for better employment at the other company. The affidavit evidence showed further that, prior to the election (which the union won by only one vote), rumors of the union's job inducement to Darling were pervasive, and that a speaker at a union meeting gave the impression that he had received a job at the other company through the union. In *EDS-IDAB, Inc.* v. *NLRB*, 666 F.2d 971, 973-974 (5th Cir. 1982), multiple affiants identified three individuals who allegedly had been threatened with violence or assaulted by various pro-union employees (one of whom was identified), and set forth the specifics of conversations that they had had with the individuals about the incidents. There was also evidence of other violence and pervasive rumors concerning the various incidents. Finally, in *Anchor Inns, Inc.* v. *NLRB*, 644 F.2d 292, 294-299 (3d Cir. 1981), one affiant asserted that a named pro-union employee, who may also have been a union agent, threatened violence against her and another identified employee in a six-person bargaining unit. The evidence showed that one threatened employee lied to the Board's Regional Director out of fear, and showed further that the alleged union agent told another identified individual that employees would lose their jobs if they did not vote for the union.

submitted no evidence from unit employees, but offered only the statement of a single supervisor containing nothing more than a third-hand rumor obtained through a grapevine of anonymous employees. The Board reasonably declined to order a hearing merely on the basis of such attenuated speculation that possible election improprieties might have occurred. See *NLRB* v. *Hepa Corp.*, 597 F.2d 166, 167 (9th Cir.), cert. denied, 444 U.S. 926 (1979); *Vari-Tronics Co.* v. *NLRB*, 589 F.2d 991, 993 (9th Cir. 1979); *NLRB* v. *National Survey Service, Inc.*, 361 F.2d 199, 208 (7th Cir. 1966); see also *Anchor Inns, Inc.* v. *NLRB*, 644 F.2d 292, 298 n.3 (3d Cir. 1981).

2. Apart from the unreliability of the supervisor's affidavit, his assertion that there was a rumor that someone had suggested calling immigration authorities, even if true, provides no basis for invalidating the election under established legal principles. It is well-settled that statements by employees — as opposed to statements properly attributed to the union — during election campaigns do not warrant setting aside an election unless the statements were so "aggravated" that free choice by employees was impossible.[8] The application of "[a]ny other rule would invite third parties or one of the protagonists who doubted the election outcome to anonymously create incidents and then attempt to use them to set aside the election." *Bush Hog, Inc.* v. *NLRB*, 420 F.2d 1266, 1269 (5th Cir. 1969).

Petitioner offered no evidence that the deportation rumor was instigated, authorized, or condoned by the

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[8]See, *e.g.*, *NLRB* v. *ARA Services, Inc.*, 717 F.2d 57, 66-68 (3d Cir. 1983) (en banc); *NLRB* v. *Aaron Bros. Corp.*, 563 F.2d 409, 412 (9th Cir. 1977); *NLRB* v. *Monroe Auto Equipment Co.*, 470 F.2d 1329, 1332 (5th Cir. 1972); *NLRB* v. *Bostik Division, USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975).

Union.[9] Moreover, as the Board and court of appeals noted (Pet. App. A8-A9, A45), nothing suggested that the rumor was pervasive or that there was other threatened or actual conduct, such as physical violence, that could have magnified the impact of the single deportation rumor.[10] Under

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[9]Contrary to petitioner's contention (Pet. 12-14), given the practical difficulty that both unions and employers face in preventing misstatements by those over whom they have no control, the mere fact that an unidentified individual makes an isolated statement at a single meeting of employees does not turn that individual into an agent of the union or otherwise indicate that the union authorized or condoned the statement. See *Abbott Laboratories, Ross Laboratories Division* v. *NLRB*, 540 F.2d 662, 666-667 (4th Cir.), cert. denied, 429 U.S. 831 (1976); see also *NLRB* v. *Sauk Valley Mfg. Co.*, 486 F.2d 1127, 1131 n.5 (9th Cir. 1973). None of the decisions relied on by petitioner (Pet. 14) supports its argument in favor of finding in this case that the employee in question acted as the agent or with the approval of the union. See *Amalgamated Clothing Workers of America* v. *NLRB*, 371 F.2d 740, 744 (D.C. Cir. 1966) (employer liable for anti-union conduct of community leaders and businessmen because of employer's failure to repudiate their ongoing, well-known, and widespread campaign against the union at the employer's plant); *NLRB* v. *Dayton Motels, Inc.*, 474 F.2d 328, 331 (6th Cir. 1973) (employer liable for the repeated and unlawful anti-union conduct of two employees who were known to have a special job status and close ties to management); *Black Diamond Coal Mining Co.* v. *Local Union No. 8460, UMWA*, 597 F.2d 494, 495 (5th Cir. 1979) (a union may, under certain circumstances, be liable for the wildcat strikes of its membership); *Shimman* v. *Frank*, 625 F.2d 80, 96-97, reh'g denied, 633 F.2d 468 (6th Cir. 1980) (union liable for campaign of threats and violence against union dissidents that was waged openly by one union official and condoned by another).

[10]Petitioner cites several cases (Pet. 9-11, 15-16) involving conduct that, although not attributable to the union, would have warranted setting aside an election if proven. In nearly all of these cases, however, in contrast to this case, the employer presented evidence of specific individuals involved in numerous incidents of threatened or actual physical violence, sometimes coupled with other threats or rumors of job loss, constituting prima facie proof that employees were likely to have been coerced. See *Zeiglers Refuse Collectors, Inc.* v. *NLRB*, 639 F.2d 1000, 1002-1003 (3d Cir. 1981); *Electronic Components Corp.* v. *NLRB*, 546 F.2d 1088, 1091-1093 (4th Cir. 1976); see also *Cross Baking Co.* v. *NLRB*, 453 F.2d 1346, 1348 (1st Cir. 1971).

these circumstances, the Board reasonably concluded that petitioner's evidence of an isolated rumor did not constitute evidence of aggravated, coercive conduct that would be likely to prevent employees' free choice.

ARA Services, Inc. v. *NLRB*, 712 F.2d 936 (4th Cir. 1983), cited by petitioner (Pet. 9-10), was a case involving deportation threats. The employer's evidence showed that an identified pro-union employee and three other employees approached three alien workers on the day before the election and threatened to report them to immigration authorities if they failed to vote for the union. The union won the election by a vote of 11 to 9. 712 F.2d at 937. As with the other cases cited by petitioner, *ARA Services* involved more specific evidence of a pointed threat likely to have a coercive impact on unit employees than did petitioner's evidence of an isolated rumor repeated third-hand.

Finally, there is no merit to petitioner's contention (Pet. 15-17) that the court of appeals *required* evidence of the actual effect of the deportation rumor on voters. The circumstance that the employer did not show that any employee's vote was affected by the rumor was only one factor, among others, that the court considered in concluding that the evidence failed to establish prima facie that the election had been held in a coercive atmosphere.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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